ORAL ARGUMENT NOT YET SCHEDULED
No. 20-7020

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER CHANDLER

Plaintiff-Appellant,

v.

DONALD BERLIN; INVESTIGATIVE CONSULTANTS, INC. AND INVESTIGATIVE CONSULTANTS, INC. OF WASHINGTON DC

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
(Case No. 1:18-cv-02136-APM)

REPLY BRIEF OF PLAINTIFF-APPELLANT

THOMAS A. CLARE, P.C.
JOSEPH R. OLIVERI
CLARE LOCKE LLP
10 Prince Street
Alexandria, VA 22314
(202) 628-7400
joe@clarelocke.com

Attorneys for Plaintiff-Appellant

September 8, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiff-Appellant Christopher Chandler respectfully states as follows:

A. Parties and Amici

Plaintiff-Appellant: Christopher Chandler.

Defendants-Respondents: Donald Berlin; Investigative Consultants, Inc.; and Investigative Consultants, Inc. of Washington DC.

There are no amici in this case to date.

B. Rulings Under Review

Plaintiff-Appellant seeks review of the following rulings by District Court Judge Hon. Amit P. Mehta:

1. April 3, 2019 Memorandum Opinion and Order granting in part Defendants' Motion for Summary Judgment (DE 24, A416-26; unpublished);

2. January 30, 2020 Memorandum Opinion (DE 37, A481-96; to be published at *Chandler v. Berlin*, 436 F. Supp. 3d 322 (D.D.C. 2020)); and

3. January 30, 2020 Order granting Defendants' Motion for Summary Judgment (DE 38; A497; unpublished).

C. Related Cases

This case has not previously been before this Court or any other court other than the district court below. The undersigned counsel are not aware of any related cases pending in this Court or any other court.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants offer no valid reasons for affirming the district court's erroneous decision. Rather than engage the law—and evidence—that make clear the district court's multiple reversible errors in granting Defendants summary judgment, Defendants confuse the issues, make arguments without any caselaw support (because there is none), and raise factual disputes that highlight the district court's errors in granting summary judgment.

Under settled law—correctly applied—Mr. Chandler is entitled to his day in court to prove the merits of his defamation claims against Defendants. By erroneously dismissing Mr. Chandler's defamation claims on threshold procedural issues wholly unconnected to their merits, the district court improperly deprived Mr. Chandler of that opportunity, notwithstanding his extraordinary efforts to identify Defendants and hold them accountable for their tortious actions. Defendants fabricated from whole cloth among the most damaging allegations possible against Mr. Chandler, accusing a person who has dedicated his life and career to philanthropic efforts helping the world's most vulnerable populations of engaging in among the worst crimes possible, including espionage and organized crime—allegations so serious they triggered an investigation of Mr. Chandler by the British Parliament. And while British MPs ultimately concluded that Mr. Chandler

"is an innocent man" who "has been unjustly dealt with,"[1] and Switzerland's chief prosecutor likewise concluded that Mr. Chandler engaged in no wrongdoing,[2] Defendants' false accusations continue to devastate Mr. Chandler's previously unblemished reputation. The district court's award of summary judgment to Defendants must be reversed.

ARGUMENT

I. Defendants Cannot Rescue The District Court's Erroneous Holding That, As A Matter of Law, Defendants Could Not Reasonably Foresee That Tabloid Journalist And Prolific Author Eringer Might Republish Their Defamatory Dossier.

Defendants offer no valid reasons for affirming the district court's holding that they could not have reasonably foreseen that Eringer might republish their salacious Dossier.

A. Defendants Simply Parrot the District Court's Erroneous Reasons for Holding Eringer's Republication of Their Dossier Unforeseeable—Without Offering Any Supporting Authority.

Defendants offer no caselaw to justify the district court's reasons for holding Eringer's republication of Defendants' Dossier unforeseeable as a matter of law or

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[1] HC Deb (22 July 2020) (678) col. 2233, *available at* https://hansard.parliament.uk/Commons/2020-07-22/debates/5B97EE49-C25D-46C2-B5F5-A25FDF80E306/SummerAdjournment?highlight=christopher%20chandler#contribution-D97285C2-BAC1-4DFD-83DE-3B1D23F8BCF2.

[2] A282; DE 22-2, 22-3.

to rebut the caselaw in Mr. Chandler's Principal Brief (at 32-38) demonstrating the district court's errors. Defendants simply repeat the district court's erroneous reasoning—while conceding a key premise undercutting their main argument, ignoring or failing to distinguish key caselaw that compels reversal, and creating (without citation) requirements for rendering republication foreseeable that do not exist.

To begin, Defendants misstate the standard for whether republication of a libel is reasonably foreseeable. As this Court has explained, "[t]he maker of a slanderous statement may be held accountable for its republication if such republication was reasonably foreseeable." *Tavoulareas v. Piro*, 759 F.2d 90, 136 n.56 (D.C. Cir. 1985), *vacated in part on other grounds*, 763 F.2d 1472 (D.C. Cir. 1985), *and aff'd*, 817 F.2d 762 (D.C. Cir. 1987); *Oparaugo v. Watts*, 884 A.2d 63, 73 (D.C. 2005) ("The original publisher of a defamatory statement may be liable for republication if the republication is reasonably foreseeable."). Defendants seize on the words "such" in *Tavoulareas* and "the" in *Oparaugo* and assert that for republication to be foreseeable, the original publisher must have foreseen the exact manner of future republication—which, contrary to Defendants' contention, would necessarily require the original publisher to also foresee the time and place of republication. But Defendants cite no caselaw imposing such a requirement, because that is not the law. *See Shepard v. Nabb*, 581 A.2d 839, 846 (Md. Ct. Spec. App. 1990) (holding that

where plaintiff "aver[red] that [defendant's defamatory] remarks ... were made with the intent that they be published in [a specific issue of a specific newspaper], ... a jury could [] find that the republication of those remarks in later issues of that newspaper or another [newspaper] was a natural and probable consequence of [making] the initial remarks," and, thus, reasonably foreseeable).

Contrary to Defendants' proffered rule, D.C. law is clear that in determining whether a future harm was foreseeable, "[a] defendant need not have foreseen the precise injury, nor need he have notice of the particular method in which harm would occur, if the possibility of harm was clear to the ordinary prudent eye." *District of Columbia v. Perez*, 694 A.2d 882, 886 (D.C. 1997); *Psychiatric Inst. of Wash. v. Allen*, 509 A.2d 619, 625 (D.C. 1986) (quoting *Kendall v. Gore Props., Inc.*, 236 F.2d 673, 682 (D.C. Cir. 1956)).[3] This makes sense: because "[f]oreseeability is measured as of the time of the defendant's wrongdoing" (*i.e.*, original publication), *Crabbs v. Scott*, 800 F. App'x 332, 338 (6th Cir. 2020); *see also* cases cited *infra*

[3] The Circuit Courts are in accord. *E.g.*, *Smith v. Christus Saint Michaels Health Sys.*, 496 F. App'x 468, 473 (5th Cir. 2012) ("Foreseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable."); *Thompson v. State Farm Mut. Auto. Ins. Co.*, 789 F. App'x 90, 92 (10th Cir. 2019); *O'Donnell v. United States*, 736 F. App'x 828, 832 (11th Cir. 2018); *Zebley v. Heartland Indus. of Dawson, Inc.*, 625 F.3d 449, 457 (8th Cir. 2010); *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1153 (7th Cir. 2010); *McNulty v. J.C. Penney Co.*, 305 F. App'x 212, 216 (5th Cir. 2008); *Atria v. Vanderbilt Univ.*, 142 F. App'x 246, 252 (6th Cir. 2005); *Malave-Felix v. Volvo Car Corp.*, 946 F.2d 967, 972 (1st Cir. 1991).

page 6 & n.4, Defendants' desired rule would make demonstrating the foreseeability of republication virtually impossible, as almost no plaintiff would be able to demonstrate—much less have a basis to allege—that a defendant should have foreseen that his libel would be republished in a ***specific*** manner (*i.e.*, in a specific article, broadcast, statement, etc.) in a ***specific*** context under ***specific*** circumstances on a ***specific*** occasion. That is not the law. *Shepard*, 581 A.2d at 846. Here, as explained below, "the possibility of [future] harm"—Eringer's republication of Defendants' libel—was reasonably foreseeable to Defendants, which is all that is required for Defendants to be liable for Eringer's republication.

Defendants' main argument that Eringer's republication of their Dossier was unforeseeable as a matter of law is—just like the district court reasoned—that "14 years [elapsed] between [Defendants'] publication [of the Dossier] and [Eringer's] republication" of it. (Defs. Br. 21, 26-29; A422.) But Defendants concede that whether republication was foreseeable must be assessed at the time of Defendants' original publication. (Defs. Br. 2 (Issue Statement: "Did the District Court correctly conclude that Robert Eringer's ... republication of [Defendants' Dossier] was not reasonably foreseeable when [Defendants] sent [it] to Eringer ... in 2003[?]")). And that concession is correct, because in tort law "'foreseeable' means ... probable *ex ante*," *Beul v. ASSE Int'l, Inc.*, 233 F.3d 441, 447 (7th Cir. 2000), and foreseeability "is measured as of the time of the defendant's

wrongdoing," *Crabbs*, 800 F. App'x at 338; *accord Oceanic Steam Nav. Co. v. Aitken*, 196 U.S. 589, 595-96 (1905) (Holmes, J.) (Foreseeability "must be determined upon the facts as they appeared at the time[.]")[4]

It necessarily follows that the passage of time ***after*** Defendants published their Dossier to Eringer cannot affect the foreseeability to Defendants of Eringer's republication of it. (Principal Br. 32-35.) ***Future events cannot make foreseeability at an earlier date more or less likely.*** Defendants offer no authority allowing hindsight assessment of foreseeability because there is none. And the district court's explanation that the passage of time after Defendants' original publication of their Dossier to Eringer was its "most important[]" reason for holding Eringer's republication unforeseeable (A422), requires reversal.[5]

Defendants next contend, like the district court stated, that Eringer's republication was unforeseeable because Defendants "fail[ed] in 2003 to anticipate

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[4] *See also, e.g.*, *James v. Meow Media, Inc.*, 300 F.3d 683, 692 (6th Cir. 2002) ("Whether an event was reasonably foreseeable is not for us to determine with the assistance of hindsight."); *First Interstate Bank of Ariz., N.A. v. Murphy, Weir & Butler*, 210 F.3d 983, 989 (9th Cir. 2000) (similar); *Ballance v. Wal-Mart Stores, Inc.*, 178 F.3d 1282 (4th Cir. 1999) (foreseeability measured with "foresight"); *Zebley*, 625 F.3d at 457.

[5] Defendants, in trying to distinguish *Green v. Cosby*, 138 F. Supp. 3d 114, 122-23, 127 (D. Mass. 2015) (holding republication eleven years later reasonably foreseeable), attempt to manufacture a requirement that for republication to be foreseeable, it must be made for the same "purpose" as the original publication. (Defs. Br. 27-28.) But Defendants' "same purpose" requirement has no support in any caselaw (and Defendants cite none).

the relevance of the [Dossier] to the Brexit debate" in 2017. (Defs. Br. 29-31; A423-24.) But that is irrelevant because, again, the pertinent question is whether republication was foreseeable at the time Defendants published the Dossier to Eringer. And, while "newsworthiness" is not required for republication to be foreseeable, both Defendants and the district court ignore the voluminous caselaw holding that allegations like those in Defendants' Dossier accusing Mr. Chandler of involvement in organized criminal activities, blackmail, and espionage are "newsworthy." *E.g.*, *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 963 n.8 (1985) (reports involving espionage are "newsworthy"); *Bement v. N.Y.P. Holdings, Inc.*, 307 A.D.2d 86, 90 (2003) (same); *Alfano v. NGHT, Inc.*, 623 F. Supp. 2d 355, 359 (E.D.N.Y. 2009) ("The activities of organized crime ... have long been a matter of public interest" and are "newsworth[y]."); *LaBruzzo v. Associated Press*, 353 F. Supp. 979, 984 (W.D. Mo. 1973) (same); *Lowe v. Hearst Commc'ns, Inc.*, 487 F.3d 246, 251 (5th Cir. 2007) (allegations of blackmail are "newsworth[y]"); *Gay v. Williams*, 486 F. Supp. 12, 16 (D. Alaska 1979) (allegations of criminality are newsworthy).

Also like the district court, Defendants contend that Eringer's republication of the Dossier was unforeseeable as a matter of law because they published it only to Eringer rather than to a large audience and because they wrote "Confidential" on it. (Defs. Br. 33-34; A423.) But Defendants recognize that such evidence is not

"determinative" of the foreseeability of republication, and courts have repeatedly held republications foreseeable despite "confidential" being written on the document republished and the original publication not being widely disseminated. *E.g.*, *Unsworth v. Musk*, No. 18-cv-8048, 2019 WL 8220721, at *11 (C.D. Cal. Nov. 18, 2019); *Tennenbaum v. Ariz. City Sanitary Dist.*, No. 10-cv-2137, 2013 WL 2422684, at *12 (D. Ariz. June 3, 2013); *Yarus v. Walgreen Co.*, No. 14-cv-1656, 2015 WL 1021282, at *4 n.1 (E.D. Pa. Mar. 6, 2015). Yet Defendants—like the district court—cite no other evidence to support the conclusion that Eringer's republication was unforeseeable as a matter of law. So while Defendants recognize that merely writing "confidential" on a document and refraining from publishing it to a large audience does not immunize a person from republication liability, they ask this Court to hold precisely that.

Finally, Defendants fall back on a generic argument that courts "regularly decide foreseeability issues on summary judgment." (Defs. Br. 34.) But Defendants' caselaw is inapposite. The D.C. cases Defendants cite address the foreseeability of criminal acts by third persons, for which—unlike the foreseeability of republication—D.C. law requires a more "demanding," "heightened showing" of foreseeability "because of the extraordinary nature of criminal conduct." *Workman v. United Methodist Comm.*, 320 F.3d 259, 263 (D.C. Cir. 2003); *Bruno v. Western Union Find. Servs., Inc.*, 973 A.2d 713, 718 (D.C. 2009); *Beckwith v. Interstate*

Mgmt. Co., 82 F. Supp. 3d 255, 258 (D.D.C. 2015). The two other cases Defendants cite address, in *dicta*, the doctrine of "compelled self-publication," which D.C. law does not recognize. *Beroiz v. Wahl*, 84 Cal. App. 4th 485, 487-88 (Ct. App. 2000); *MSK EyEs Ltd. v. Wells Fargo Bank, Nat'l Ass'n*, 546 F.3d 533, 542-44 (8th Cir. 2008).[6]

B. Defendants Cannot Avoid the District Court's Failure to Consider—and Credit—Evidence That Courts Have Repeatedly Held Make Republication of a Libel Reasonably Foreseeable.

The district court's holding that it was unforeseeable as a matter of law to Defendants that Eringer would republish their Dossier must also be reversed because the court failed to credit key evidence of the types that courts have repeatedly held render republication of a libel reasonably foreseeable (Principal Br. 25-31)—and Defendants provide no reason to conclude otherwise.

Publication To A Journalist. Defendants do not dispute that when a person publishes a defamatory statement to a journalist, "it [is] reasonably foreseeable that as reporters they might republish the statements." *Tavoulareas*, 759 F.2d at 136 n.56; *see also e.g.*, *Unsworth*, 2019 WL 8220721, at *11; *Wright v. Bachmurski*, 29

[6] *El-Hadad v. Embassy of United Arab Emirates*, No. 96-cv-1943, 2006 WL 826098, at *17 (D.D.C. Mar. 29, 2006) (District of Columbia has not adopted the doctrine of "compelled self-publication," which "is not a widely accepted theory" of republication), *aff'd in relevant part*, *rev'd in part on other grounds sub nom. El-Hadad v. United Arab Emirates*, 496 F.3d 658 (D.C. Cir. 2007).

P.3d 979, 985 (Kan. Ct. App. 2001); *Wiggins v. Creary*, 475 So. 2d 780, 782 (La. Ct. App. 1985). Nor could Defendants contend otherwise.

Defendants' only response is to make a factual argument that Eringer's republication of their Dossier was not reasonably foreseeable because Eringer was not a journalist in/around 2002 when he contracted with them to author it. (Defs. Br. 31-33.) In so doing, Defendants ask this Court to ignore record evidence that Eringer *was* a journalist. But, on summary judgment, this Court must "view[] the evidence in the light most favorable to [Mr. Chandler] and draw[] all reasonable inferences in [his] favor." *Stoe v. Barr*, 960 F.3d 627, 629 (D.C. Cir. 2020). And there is substantial evidence that Eringer was a journalist in/around 2002 (Principal Br. 27-28), including evidence that Eringer:

- By 2002 had published numerous books, including many focused on Monaco, espionage, and "investigations," and continued to do so even after 2002 (A265-66, ¶¶3, 6, 8; A296-99; A301; A303);
- In 2001 was nationally featured as "a fairly prolific author" by *Salon* Magazine (A408); and
- Worked as a "freelance journalist" (A266, ¶3).

Indeed, Defendants' effort to gin up a fact dispute about evidence that alone is capable of rendering Eringer's republication foreseeable (evidence the district court failed to consider) highlights that summary judgment was improper.

Publication Of Salacious/Sensational Allegations. Defendants likewise do not dispute that salacious and sensational allegations are likely to repeated,

thereby making republication reasonably foreseeable. *E.g.*, *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746, 764 (Mass. 2007); *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1096 (S.D.N.Y. 1984); *Moore v. Allied Chem. Corp.*, 480 F. Supp. 364, 376 (E.D. Va. 1979); *Tumbarella v. Kroger Co.*, 271 N.W.2d 284, 290-91 (Mich. Ct. App. 1978); Restatement (Second) of Torts § 576 cmt. d. Nor could they. And Defendants do not dispute that allegations of espionage, organized-crime involvement, and other criminal activities are salacious and sensational. Nor could they. Yet that was the exact substance of Defendants' defamatory statements. (A349, A354-55; A68, ¶50.).

Defendants' only response is to misdirect by claiming that Mr. Chandler argues that all "discreditable" statements may foreseeably be republished so as to render the republication of *any* defamatory statement foreseeable because "[d]efamation cases always involve 'discreditable statements.'" (Defs. Br. 30-31.) But that is not Mr. Chandler's argument. While all defamatory statements may be "discreditable" in that they harm one's reputation, not all defamatory statements involve allegations as sensational as the accusations of espionage, organized-crime involvement, and other criminal activities in Defendants' Dossier.

Evidence Defendants Invited Eringer's Republication. Defendants, remarkably, do not even address the evidence of their own statements to Eringer that he should not rely on the Dossier's allegations against Mr. Chandler until

"confirmed by secondary sources" other than Defendants. (A403, ¶¶5-6.) In other words, Defendants told Eringer to confirm the Dossier's defamatory allegations with others, thereby inviting him to repeat (*i.e.*, republish) those allegations. That is powerful evidence that it was foreseeable to Defendants that Eringer may republish the Dossier's defamatory allegations.

Evidence Defendants Know Their Clients Repeat The Information Defendants Provide. Defendants remarkably also do not address the evidence that, based on their decades of experience (A263, ¶2; A267, ¶11; A347), they know that information in the background reports they produce is often shared by their clients. (A346-48.) Defendants know their clients use their reports to, among other things, perform corporate due diligence, undertake compliance activities, and pursue complex litigation—all of which involve (or may involve) repeating the purported facts in those reports. (*Id.*) Indeed, Defendants explain that "all searches done by ICI must be executed based upon a cognizable permissible purpose under ... State and Federal laws" (A346), which would not include obtaining a background report for one's private curiosity. Simply put, Defendants know that their clients engage their services to obtain information to ***use***, which may involve sharing it with third parties—*i.e.*, republishing it. This is further evidence suggesting it was reasonably foreseeable to Defendants that Eringer might republish their Dossier. *E.g.*, *Bolduc*

v. Bailey, 586 F. Supp. 896, 898, 901 (D. Colo. 1984); *Liverpool v. Con-Way, Inc.*, No. 08-cv-4076, 2009 WL 1362965, at *10 (E.D.N.Y. May 15, 2009).

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Defendants offer no valid reasons for affirming the district court's holding that, as a matter of law, it was unforeseeable to Defendants that Eringer might republish their Dossier. The district court's grant of summary judgment with regard to that republication should be reversed.

II. Defendants Offer No Valid Reason To Affirm The District Court's Erroneous Holding That Mr. Chandler's Defamation Claim Based On Defendants' Secret 2003 Publication Of Their Dossier To Eringer Is Time-Barred Despite Application Of The Discovery Rule.

In an attempt to save the district court's second erroneous holding—that Mr. Chandler's defamation claim against Defendants based on their secret publication of their Dossier to Eringer is time-barred despite the application of D.C.'s discovery rule—Defendants invoke inapposite caselaw, ask this Court to apply inapplicable precedent, misconstrue that inapplicable precedent, and fundamentally misstate the requirements of "due diligence" with regard to statutes of limitations. Defendants fail to carry their "heavy burden" of proving that Mr. Chandler's claim is time-barred. *See Reeves v. Eli Lilly & Co.*, 368 F. Supp. 2d 11, 25 (D.D.C. 2005).

A. Defendants' Reliance on *Estate of Chappelle* Is Misplaced.

Defendants first contend that *Estate of Chappelle v. Sanders*, 442 A.2d 157 (D.C. 1982), on which the district court did not rely, justifies the district court's holding. (Defs Br. 38-42.) But *Chappelle* is inapplicable.

As an initial matter, Defendants do not dispute that under *Diamond v. Davis*, 680 A.2d 364, 381 (D.C. 1996), a plaintiff's cause of action against a defendant does not accrue until "the plaintiff has either actual notice of her cause of action or is deemed to be on inquiry notice because if she had met her duty to act reasonably under the circumstances in investigating matters affecting her affairs, such an investigation ... would have led to actual notice." *Id.* at 372. And Defendants agree that a plaintiff has no "duty to investigate matters affecting her affairs" for statute of limitations purposes until "the plaintiff actually knows, or with the exercise of reasonable diligence would have known, of ***[1] some injury, [2] its cause-in-fact, and [3] some evidence of wrongdoing***." *Id.* at 381; Defs.' Br. 36.[7] Only when the plaintiff knows or through the exercise of reasonable diligence would have known of (1) an injury, (2) its cause-in-fact, and (3) evidence of wrongdoing resulting in that injury does the statute of limitations begin to run on a claim. *Diamond*, 680 A.2d at 381.

[7] Emphases added unless otherwise noted.

Chappelle simply recognized that when a plaintiff knows those three facts (injury, its cause-in-fact, and wrongdoing), his cause of action accrues, even if the defendant concealed his identity. In *Chapelle*, plaintiff (administratrix of a decedent's estate) sued defendants, the driver and owner of a car, outside the applicable limitations period, for causing the decedent's death in a car accident. *Id.* at 158. The plaintiff argued that the statute of limitations was tolled because the driver provided a false name such that she did not know his identity until after the limitations period elapsed. *Id.* The plaintiff did ***not*** dispute that she knew about (1) the decedent's injury (death), (2) its cause-in-fact (car accident), and (3) evidence of wrongdoing (negligent driving); the only fact plaintiff did not know was the driver's identity. *Id.* The D.C. Court of Appeals held plaintiff's claim time-barred because ***"[plaintiff] ... does <u>not</u> allege that [defendants] concealed the existence of a cause of action*** but rather, that they concealed their identities," ***and "[c]oncealment of the identity of parties liable, or concealment of the parties, has been held not to constitute concealment of the cause of action*** and not to ... avoid the running of the statute of limitations." *Id.*

This case, in contrast to *Chappelle*, is not one in which a plaintiff knows of an injury, its cause-in-fact, and some evidence of wrongdoing and just does not know the defendant's identity. "Defendants do not contend" that Mr. Chandler knew of the existence of their Dossier or their role in its preparation—*i.e.*, the cause-in-fact

of his injury and evidence of wrongdoing, and thus the injury caused by that Dossier's secret publication to Eringer. (DE 32-2 at 11; A491.) The only question is whether Mr. Chandler's knowledge that he may have defamation claims *against Eringer* put him on inquiry notice of his claims *against Defendants* and, if so, whether Mr. Chandler ***would*** have discovered, through the exercise of reasonable diligence, (1) his injury (reputational harm), (2) its cause-in-fact (Defendants' authorship of the Dossier and secret publication of it to Eringer), and (3) evidence of Defendants' wrongdoing (tortious publication) more than a year before he filed this case. The answer is no, and the D.C. Court of Appeals has distinguished this scenario from *Chappelle*. *Diamond*, 680 A.2d at 380 n.14.

B. Defendants Repeat the District Court's Error: Mr. Chandler's Knowledge of Defamation Claims Against Eringer Did *Not* Cause His Claims Against Defendants to Accrue.

Defendants cannot save the district court's erroneous holding that Mr. Chandler's knowledge that he could have potentially sued Eringer for defamation based on statements Eringer made in his 2009 lawsuit, 2014 book, or 2016 blog post—in other words, Mr. Chandler's knowledge that he could have brought ***different*** claims against a ***different*** person based on ***different*** publications at ***different*** times to ***different*** audiences causing ***different*** harm—caused his claims against Defendants to accrue.

To begin, Defendants do not dispute that under D.C. law, "the plaintiff's knowledge of wrongdoing on the part of one [person] d[oes] not cause accrual of action against another, unknown [person]." *Diamond*, 680 A.2d at 380; *accord Hobson v. Wilson*, 737 F.2d 1, 36 (D.C. Cir. 1984). And Defendants concede that although this Court recognized a limited exception to that rule in *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977), that exception only applies where two people are (1) "responsible for the same harm" ***and*** (2) "closely connected, such as in a superior-subordinate relationship," *Diamond*, 680 A.2d at 380; Defs. Br. 42-48. That agreed-upon law requires reversal.

1. Defendants Cannot Justify the District Court's Application of *Fitzgerald* Because Defendants' Publication and Eringer's Republication of the Dossier Caused Separate Harms.

This Court's decision in *Fitzgerald* is inapplicable here because (as Defendants' concede) *Fitzgerald*'s exception to the general rule that a plaintiff's knowledge of wrongdoing by one person does not accrue his claims against another person can only apply where those persons are "responsible for the same harm"—and as the district correctly noted (before then incorrectly applying *Fitzgerald*), "Eringer's republications of the [Dossier] constitute ***different harms*** than [Defendants'] initial publication of the [Dossier]." (A495.)

This conclusion follows inexorably from settled D.C. law that "each communication of [even] the same defamatory matter" whether "by the same

defamer" or a separate person, and "whether to a new person or to the same person, is a separate and distinct publication" that causes separate harm and supports "a separate cause of action." *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 n.3 (1984) (quoting Restatement (Second) of Torts § 577A cmt. a); *see also Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1087 (D.C. Cir. 2007); *Foretich v. Glamour*, 753 F. Supp. 955, 960 (D.D.C. 1990).

Notably, Defendants do not even attempt to dispute this law. Rather, Defendants' only response is to argue (without legal citation or support) that "[i]f the [Dossier] is the basis for Eringer's charges, it follows that it is also the basis for any repetition of those charges and is therefore responsible for any harm caused by that repetition," and that "[t]he discovery rule does not permit a plaintiff who is aware of *an* injury, *its* cause and evidence of wrongdoing to wait to see if additional harm occurs before filing suit." (Defs. Br. 47-48.)

But in so arguing Defendants fundamentally misunderstand—and ask this Court to overturn—the settled D.C. law that "each communication of [even] the same defamatory matter" (*i.e.*, each publication or republication of a libel) "is a separate and distinct publication" that causes separate harm and supports "a separate cause of action." *Keeton*, 465 U.S. at 774 n.3; *Jankovic*, 494 F.3d at 1087; *Foretich*, 753 F. Supp. at 960. This is ***not*** a case in which the plaintiff suffered a single injury and waited to see if it would worsen before suing, as in the non-defamation cases

Defendants cite.[8] And while Defendants may not like the law that republication of a libel constitutes a separate tort causing separate harm giving rise to a separate cause of action, they do not and cannot dispute it. And that law compels the conclusion that the district court erred in applying *Fitzgerald* here.

2. Even if *Fitzgerald* Applied, Defendants, Like the District Court, Misconstrue Its "Closely Connected" Requirement.

Under D.C. law, a plaintiff's knowledge of wrongdoing by one person does ***not*** accrue his claims against another person. And although *Fitzgerald* carved out an exception to that rule, it only applies where two putative defendants are "closely connected, such as in a superior-subordinate relationship"—but Defendants and Eringer are not "closely connected" under *Fitzgerald*. (Principal Br. 43-48.)

The *Fitzgerald* Court, in assessing whether two persons are "closely connected" such that a plaintiff's knowledge of a claim against one accrues his claim against the other, focused on whether there was a relationship between those two persons and the character and extent of that relationship. (*Id.*) Thus, this Court held that Fitzgerald's knowledge of his conspiracy claim against certain top Air Force officials accrued his claim against "lesser fry" Air Force officials, stressing the

[8] *Nelson v. Am. Nat'l Red Cross*, 26 F.3d 193, 197 (D.C. Cir. 1994) (single harm (HIV infection); plaintiff waited to sue until condition deteriorated); *Colbert v. Georgetown Univ. Hosp.*, 632 A.2d 119 (D.C. 1994) (single harm (negligent removal of cancer); plaintiff waited to sue until cancer metastasized).

closeness of their connection as members of the same organization and reasoning that "it would be anomalous and unjust to allow [Fitzgerald] to begin an action against lesser fry [officials] merely because their identity and participation were earlier unknown." *Fitzgerald*, 553 F.2d at 229. By contrast, that knowledge did ***not*** accrue Fitzgerald's claim against a White-House-official co-conspirator because he was not "closely connected" to the top Air Force officials Fitzgerald knew he could sue. *Id.* The White House official was in a different organization than the Air Force officials—in the Court's words, "in a different center of power"—and had no "close connection" to the Air Force officials besides his tortious acts furthering the conspiracy. *Id.*

Here, Defendants, like the district court, analogize Eringer and Defendants to the Air Force superior and "lesser fry" officials in *Fitzgerald* rather than to an Air Force official on the one hand and a White House official on the other. (Defs. Br. 44-46; A489.) But, like the district court, Defendants' only argument for doing so is that Eringer contracted with Defendants—on a single occasion, at arms'-length—to produce the defamatory Dossier. That does not make them "closely connected."

The fact that Defendants and Eringer both committed tortious acts against Mr. Chandler does not make them "closely connected." In *Fitzgerald*, both the Air Force and White House defendants conspired together to cause the *same* harm to

Fitzgerald, but that did not render them "closely connected." 553 F.3d at 229.[9] Similarly, in *Hobson*, this Court held that FBI agents and D.C. policemen who conspired together to infringe the plaintiff's civil rights were not "closely connected" despite their joint tortious conduct. 737 F.2d at 36. And in *Richards v. Mileski*, 662 F.2d 65, 70 (D.C. Cir. 1981), this Court held State Department employees and an informant who conspired against the plaintiff were not "closely connected" despite their joint tortious conduct. It follows that joint tortious conduct cannot as a matter of law render two persons "closely connected" under *Fitzgerald*. Defendants offer no caselaw holding otherwise. And Defendants and Eringer did not even commit the same tortious act causing the same harm to Mr. Chandler, thus further distancing them from each other.

Likewise, the fact that Eringer contracted with Defendants on a single occasion to produce the Dossier does not render them "closely connected." *Fitzgerald* has been uniformly interpreted to require a relationship between two people for them to be "closely connected," and where such relationship is lacking,

[9] Defendants try to distinguish *Fitzgerald* by asserting that the "White House aide who was denied summary judgment in *Fitzgerald* ... had no role in the dissemination of false information about the plaintiff." (Defs. Br. 45.) But Defendants' distinction is incorrect, as the White House official (like the Air Force officials) *did* make false and disparaging comments about Fitzgerald, including accusing him of disloyalty. *Fitzgerald*, 553 F.2d at 225. And, in any event, the distinction is irrelevant to the (lack of) relationship between the White House official and Air Force officials.

Fitzgerald is inapplicable. *E.g.*, *Hobson*, 737 F.2d at 36 (members of FBI "closely connected" with each other but not with policemen co-conspirators); *Richards*, 662 F.2d at 70 (State Department employees "closely connected" with each other but not with informant co-conspirator). Defendants cite no caselaw holding otherwise.[10] And that is not surprising because entry into a "single transaction" (here, to produce the Dossier) does ***not*** create a relationship between two parties. *E.g.*, *Chung v. NANA Dev. Corp.*, 783 F.2d 1124, 1128 (4th Cir. 1986); *Alacrity Renovation Servs., LLC v. Long*, No. 16-cv-206, 2016 WL 4150011, at *7 (W.D.N.C. Aug. 3, 2016). Eringer and Defendants are not members of the same organization, group, or company and have no ongoing relationship whatsoever. They are not "closely connected."

C. The District Court Reversibly Erred in Holding That Mr. Chandler Was on Inquiry Notice of His Claims Against Defendants and *Would*, Through the Exercise of Reasonable Diligence, Have Discovered His Claims Against Them More Than a Year Before He Filed This Case.

Finally, the district court erroneously held that Mr. Chandler (1) was "put on inquiry notice of Defendants' role [in authoring and publishing the Dossier] when he learned of" Eringer's 2009 lawsuit against Prince Albert, 2014 book, and 2016

[10] The one case Defendants claim holds otherwise, *Gardel v. SK&A Structural Eng'rs PLLC*, 286 F. Supp. 3d 120 (D.D.C. 2017), is a run-of-the-mill discovery rule case that does not involve *Fitzgerald* or the issue of whether knowledge of a claim against one person accrues a claim against another.

blog post excerpting that book, and (2) would have discovered the Dossier and Defendants' authorship and secret publication of it through a reasonably diligent investigation. (A492-93; Principal Br. 48-55.) Defendants simply parrot the district court's erroneous reasoning.

First, the district court erred in holding as a matter of law that Eringer's 2009 lawsuit, 2014 book, and 2016 blog post—none of which mention Defendants or their Dossier—put Mr. Chandler on inquiry notice of the Dossier's existence and Defendants' secret authorship and publication thereof. (A492-93.)

The only reason that the district court (and Defendants) offer for Eringer's lawsuit putting Mr. Chandler on inquiry notice of the existence of the Dossier and Defendants' authorship thereof is that Eringer's complaint—in which Eringer repeatedly takes full credit for his investigation of Mr. Chandler[11]—states that "Eringer possesses documents on this matter" of "Eringer['s] intensive[] investigat[ion]" of Mr. Chandler. (A492 (quoting A310, ¶13); Defs. Br. 38-42.) But Eringer's statement about his purported documents is "pure hearsay" that "counts for nothing" and may not be considered by the court at summary judgment. *McGrath v. Clinton*, 666 F.3d 1377, 1382-83 (D.C. Cir. 2012); *accord Hurd v. District of Columbia*, 864 F.3d 671, 686 (D.C. Cir. 2017) (court may not "rely on [a complaint]

[11] A310, ¶13 ("Eringer intensively investigated ... Richard and Christopher Chandler[.]")

for the truth of the matter asserted").[12] Indeed, such hearsay may not be accepted because it is inherently unreliable, and such an inherently unreliable statement could not put Mr. Chandler on inquiry notice of the existence of the Dossier and Defendants' authorship thereof. *Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 60 n.9 (D.D.C. 2009) ("[I]t would have been unreasonable for [party] to act solely upon [] potentially unreliable hearsay."), *aff'd sub nom. Navab-Safavi v. Glassman*, 637 F.3d 311 (D.C. Cir. 2011). That is especially the case here, where Eringer made his statement in the context of his lawsuit in which he claims credit for his investigations and makes generic references to "documents" referring to no fewer than twenty-eight different purported investigations described in his complaint. (A309-32.)

Likewise, the only reason that the district court (and Defendants) offer for Eringer's book (and blog post) putting Mr. Chandler on inquiry notice of the existence of the Dossier and Defendants' authorship thereof is that Eringer's use of "'we' and 'our' when referring to his investigation of the Chandler brothers" is an "obvious clue[]" Eringer did not act alone in his investigation. (A493; Defs. Br. 41.) But a reasonable reader could understand Eringer—whose "pure hearsay" may not be assumed true—to simply be using the "royal we" in places in his book. *Rawlins*

[12] The fact the complaint was verified does not change this. *E.g.*, *Rowland v. Rowland*, No. 04-cv-2068, 2005 WL 3096169, at *4 (N.D. Ga. Nov. 18, 2005).

v. Kansas, 714 F.3d 1189, 1194 (10th Cir. 2013); *Chicago Manual of Style* ¶5.51 (15th ed. 2003). And reasonable readers could likewise understand Eringer's use of "we" to refer to Eringer *and Prince Albert*, because Eringer makes clear in his book (and blog post) that Eringer (purportedly) investigated Mr. Chandler at the direction of Prince Albert—such that, from Eringer's perspective, it was "our" (Eringer's and Prince Albert's) investigation. Simply put, it is untenable to conclude, as a matter of law, that Eringer's book and blog post, which never mention Defendants or their Dossier, put Mr. Chandler on inquiry notice of the Dossier's existence and Defendants' authorship thereof.

Second, even if Mr. Chandler were on inquiry notice, the district court erred by holding that through the exercise of reasonable diligence Mr. Chandler "surely would have discovered the [Dossier] ... that [Defendants] w[ere] its author," and that Defendants secretly published it to Eringer. (A489-90, A493.) Notably, as Defendants acknowledge, the relevant question is whether Mr. Chandler ***would*** have discovered these facts, ***not*** if he ***could*** or might have discovered them. *Diamond*, 680 A.2d at 381; Defs. Br. 49.

The district court's only basis for its holding on this point—and Defendants' only argument for affirmance—is that "reasonable diligence" required Mr. Chandler to sue Eringer for defamation and obtain court-ordered discovery because that discovery (purportedly) would have revealed the Dossier's existence and

Defendants' authorship and secret publication of it. (A489-90, A493; Defs. Br. 49-53.) But "[i]t is settled that reasonable diligence does ***not*** require a person to commence a lawsuit in order to procure court-ordered discovery of concealed facts." *Baskin v. Hawley*, 807 F.2d 1120, 1131 (2d Cir. 1986); *accord Locke v. Allstate Ins. Co.*, 145 F.3d 1346, 1998 WL 193135, at *2 (10th Cir. 1998) (unpublished); *Foltz v. U.S. News & World Report, Inc.*, 627 F. Supp. 1143, 1150 (D.D.C. 1986); Principal Br. 51-54. Defendants cannot avoid this settled law, and the cases they cite as holding to the contrary do no such thing.[13]

Notably, this law makes sense, because even if Mr. Chandler had sued Eringer, there is no guarantee that he would have obtained discovery and no guarantee that that discovery would have revealed the Dossier's existence and Defendants' authorship and secret publication of it. *See Whitmore v. Arkansas*, 495 U.S. 149, 159-60 (1990) ("It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case."). To obtain discovery, Mr. Chandler would have had to overcome Eringer's motions to

[13] Defendants cite *Chappelle*, but there, unlike here, the plaintiff knew of her cause of action against the defendant (injury, cause-in-fact, and wrongdoing), and simply did not know the defendant's identity. 442 A.2d at 159. Likewise, in *Fitzgerald* the plaintiff knew of his cause of action against the top Air Force officials and could have sued them and amended his complaint if discovery revealed the involvement of the "closely connected" "lesser fry" Air Force officials. 553 F.2d at 229. And Defendants omit key language from their quotation of *Brin v. S.E.W. Inv'rs*, 902 A.2d 784, 794 (D.C. 2006), which is wholly inapposite.

dismiss—and secure his cooperation in discovery—but Eringer may have had meritorious defenses to Mr. Chandler's claims. With regard to his 2009 complaint, Eringer could have invoked the absolute judicial proceedings privilege. *E.g.*, *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 338 (D.C. 2001). Defendants assert that Eringer published his defamatory accusations as part of work for a foreign state (Monaco) (Defs. Br. 32), and, if so, he could have raised a Foreign Sovereign Immunities Act defense. 28 U.S.C. § 1605(a)(5)(B). And Eringer may have raised other defenses. Or Eringer—who has had no fewer than five default judgments entered against him[14]—may have simply refused to participate in the lawsuit. Or Eringer may not have possessed documents reflecting the Dossier and Defendants' connection to it. (A274, ¶63; A403, ¶2; A467-68.)

Defendants complain that this is "speculation" about how a lawsuit against Eringer may have turned out. But that is exactly the point. The question under *Diamond* is whether Mr. Chandler ***would*** have discovered the Dossier and Defendants' authorship and publication of it through a lawsuit against Eringer—***not*** whether he ***could*** have. 680 A.2d at 381. Because the outcome of that litigation is

[14] *See* https://tinyurl.com/y6rpea4q; https://tinyurl.com/y4vj7pbf; https://tinyurl.com/y6ysexfg; https://tinyurl.com/yx8n6b6q; https://tinyurl.com/y2xcw82o.

inherently uncertain, the district court reversibly erred in holding, as a matter of law, that it ***would*** have led Mr. Chandler to discover the Dossier and Defendants' authorship and publication of it.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Chandler respectfully requests that the Court reverse the district court's judgment and remand this case with instructions that the parties proceed to full discovery.

Date: September 8, 2020

Respectfully Submitted,

/s/ Joseph. R. Oliveri

THOMAS A. CLARE, P.C.
JOSEPH R. OLIVERI
CLARE LOCKE LLP
10 Prince Street
Alexandria, VA 22314
(202) 628-7400
joe@clarelocke.com

Attorneys for Plaintiff-Appellant Christopher Chandler

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/s/ Joseph. R. Oliveri
Joseph. R. Oliveri
Attorney for Plaintiff-Appellant Christopher Chandler

Dated: September 8, 2020

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I hereby certify that a true and correct copy of this Reply Brief of Plaintiff-Appellant was filed with the Clerk of the Court using the Court's CM/ECF system on September 8, 2020, which will send notification of such filing to counsel for all parties as follows:

Steven Michael Oster
John Patrick Dean
OSTER MCBRIDE PLLC
1320 19th Street, NW
Suite 601
Washington, DC 20036
Telephone: (202) 596-5291
Telephone: (202) 725-8110
Email: soster@ostermcbride.com
Email: johndean8@aol.com

Dated: September 8, 2020

By: */s/ Joseph. R. Oliveri*
Joseph R. Oliveri